

Tribal Shellfish Resource Management



Introduction

Shellfish — clams, oysters, mussels, crab, and other species — have been an integral part of western Washington's native peoples for thousands of years.

Many types of shellfish were available for harvest throughout the year, and were second only to salmon in importance as a source of nutritious food. Plentiful clams and mussels were smoked and preserved for use when other foods were unavailable.

Shellfish were used for more than a subsistence food. Some shells were shaped into tools for scraping animal hides. Large shells were used as storage containers, while others constituted a form of currency in trade with other tribes and explorers. Newspaper accounts from the state's territorial days note the brisk trade of clams and oysters between Indian harvesters and the region's new settlers.

Today, shellfish remain a vital staple of Indian tribes for commercial, ceremonial and subsistence use. With the rapid depletion of many salmon stocks due to land practices and western Washington's explosive population growth, many tribal members who once made a living harvesting salmon now supplement their income with commercial shellfish harvesting. Shellfish remain a

viable food source, and an important item at religious ceremonies and community gatherings.

The Treaties

The tribes' right to harvest finfish and shellfish from western Washington marine areas was guaranteed in a series of treaties signed in 1854 and 1855 with federal representatives led by Territorial Governor Isaac Stevens. Language pertaining to tribal shellfish harvesting included this section:

“The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; and of erecting temporary houses for the purpose of curing; together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, That they shall not take shell-fish from any beds staked or cultivated by citizens.”

(Treaty With The S'Klallam, Jan. 26, 1855)

In exchange for their continued right to harvest fish and shellfish, the tribes allowed the federal government to peacefully settle much of western Washington with few skirmishes between Indians and newcomers.

Prior Court Cases

The treaty tribes' right to hunt and fish off their designated reservations was confirmed in a 1905 United States Supreme Court decision, U.S. v. Winans. The high court ruled that where a treaty reserves the right to fish at “all usual and accustomed places,” the state may not preclude access to those places.

The ruling was largely ignored by state officials. Treaty Indian fishers were routinely beaten, harassed, and arrested for exercising their treaty rights, and the tribes had to fight several decades longer before their rights were fully restored. A series of legal battles in the late 1960s and early '70s culminated with a 1974 ruling made by U.S. District Court Judge George Boldt.

Judge Boldt ruled that the treaties' “in common” language meant the tribes had reserved the right to take up to 50 percent of the harvestable salmon and steelhead in western Washington. His ruling, later upheld by the U.S. Supreme Court, established the tribes as co-managers of the salmon and steelhead resource with the State of Washington.

Decades of confrontation gave way in the 1980s to cooperation. The tribes and the state now work together to develop comprehensive plans that address the needs of Indian and non-Indian fishermen, as well as the long-term stability of the salmon.

Negotiations

While Boldt's ruling dealt with salmon and steelhead, and didn't specifically address shellfish, it was evident to both the tribes and the state that a similar outcome would occur if the tribes pursued their treaty-protected shellfish harvest rights in the court system. In the late 1980s the two sides met at the negotiating table to begin talks aimed at heading off another lengthy and expensive court battle. After failing to reach an agreement, the tribes filed suit in 1989 under U.S. v. Washington to have their treaty shellfish rights defined by the court.

Even after filing suit to have their shellfish rights restored, the tribes again met with the state to negotiate a deal. Years of intensive talks, plus an impartial mediator, failed to yield an agreement. Once again, the tribes were forced to seek justice in the court system.

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'The Rafeedie Decision'

On December 20, 1994, Federal Circuit Judge Edward Rafeedie ruled

that western Washington Indian tribes who signed treaties in the 1850s reserved the right to take up to 50 percent of the harvestable shellfish resource from all of western Washington waters and tidelands, except for shellfish contained in artificially created beds. Clams, oysters, crab, shrimp, and subtidal shellfish such as geoduck, sea urchin and sea cucumber are among the species covered in the ruling. His ruling was based on Judge Boldt's 50-50 sharing principle.

"This right was promised as a sacred entitlement, one which the United States had a moral obligation to protect," Rafeedie wrote in his decision. "The court may not rewrite the treaties or interpret the treaties in a way contrary to settled law simply to avoid or minimize any hardship to the public or to the intervenors (property owners, commercial shellfish growers)."

All western Washington public and private tidelands, except for shellfish contained in artificially created beds, are subject to treaty harvest, but with several time, place and access restrictions for treaty shellfish harvesting on private beaches. Commercial shellfish operations that harvest exclusively from artificial beds are not part of the tribes' treaty right, Rafeedie ruled.

The only growers' beds subject to the treaty right are those whose existence is due entirely to the natural propagation of the species. Four other types of beds are off-limits to tribal harvesting: Those created by "scratch;" those enhanced by seeding or netting existing beds; those enhanced by preventive efforts, such as predator control or rototilling; and

those developed "passively" through natural shellfish migration from an artificial bed to a new area.

The tribes must inform private property owners in writing one month before they plan to survey or harvest shellfish on a private beach, and they are limited to no more than five days a year to harvest shellfish from any given private beach with less than 200 feet of shoreline. The harvest period for larger parcels is an additional day for each additional 50 feet of shoreline. Harvest can occur at night, but only if necessary.

The tribes are permitted to cross privately owned uplands to reach shellfishing areas, but only by convincing a special master in dispute resolution that no water or public land access is available.

The ruling of the court covers 19 tribes in the case: Hoh, Jamestown S'Klallam, Lower Elwha Klallam, Lummi, Makah, Muckleshoot, Nisqually, Nooksack, Port Gamble S'Klallam, Puyallup, Quileute, Sauk-Suiattle, Skokomish, Squaxin Island, Stillaguamish, Suquamish, Swinomish, Tulalip, and Upper Skagit.

Implementing The Judge's Ruling

The judge's implementation plan includes a dispute resolution process through which any group could dispute any other group's harvest plans. Each party to the case will designate one person to the panel, and one representative will be chosen at random to hear each issue. The judge will approve the persons designated to be

on the special master panel, and the parties will have an opportunity to challenge the designees of the other parties if they can show bias.

After hearing evidence from the affected parties in a dispute, the special master will make a report and recommendation to the court for a final decision.

Public Health

Shellfish growing areas are surveyed for current or potential pollution impacts, and are then classified based on the survey information. No shellfish harvesting is allowed from beaches that have not been certified by the tribes and the Washington Department of Health. Growing areas are regularly monitored for water quality status and biotoxins to protect public health.

Tribal and state officials have a cooperative program to protect the public from contaminated shellfish. This shellfish sanitation agreement, approved by Judge Rafeedie, ensures all shellfish harvested within Washington meets federal public health standards.

Talks Continuing

The same spirit of tribal/state co-management cooperation that has been developed over the past two decades with regard to salmon and steelhead must now take place with regard to shellfish. Providing harvest opportunity for both Indian and non-Indian harvesters, while ensuring sustainable shellfish populations, are central to the co-management principle.

Despite their clear court victory, the tribes remain committed to seeking a negotiated settlement, believing that such a settlement can be readily implemented.

All parties of the case entered into a federal mediation process to work toward a settlement. The mediator, from the federal Ninth Circuit Court of Appeals, is expected to make a final settlement proposal to the parties this spring. If mediation does not bring about a viable solution, the parties are scheduled to return to the courtroom in May to plead their cases in the appellate court system.

Management Planning Continues

Individual tribes have cooperatively developed management plans with the State of Washington for most commercially important shellfish species, such as crab, geoduck, sea urchin and shrimp. Commercial, ceremonial and subsistence fisheries are occurring for many deepwater and free-swimming species.

The tribes are assuming a greater management responsibility for shellfish on public tidelands by conducting population surveys and working with state officials to develop harvest management plans. Similar surveys and plans are also being developed for federal tidelands in many areas.

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Shellfish population surveys have been completed for many private beaches as a first step in treaty harvesting. The information gathered by the tribes' professional staffs is shared with property owners.

Agreements are also being drawn up for private tidelands owners. One of the first such agreements between a tribe and private tideland owner occurred recently on shellfish-rich tidelands on Hood Canal.

The Point No Point Treaty Council (PNPTC), a natural resources consortium representing the treaty concerns of the Skokomish, Port Gamble S'Klallam, Jamestown S'Klallam and Lower Elwha Klallam tribes, developed the agreement with the tidelands owner. It establishes the principles and procedures which will govern the harvest of the shellfish resources on the tidelands.

The harvest management agreement covers Pacific oysters, Manila clams, native littleneck clams, butter clams and cockles — all species which the tribes have depended upon for subsistence and trade for many years.

Under the agreement, PNPTC shellfish biologists and technicians can conduct a shellfish population survey on the tidelands each year to determine the nature, extent and scope of the shellfish resource. Notice of dates and times scheduled for the population survey will be provided to the tidelands owner no less than one month in advance of the survey. The notice includes the name, address and telephone number of a tribal representative responsible for administration of the survey.

The agreement will serve as a working model of how other tideland owners can work with the tribes for the mutual benefit of both parties.

The survey will be paid for by PNPTC, and all of the data collected will be shared with the tidelands owner.

Tribal fisheries will be designed to not exceed 50 percent of the total allowable harvest. Any additional tribal harvest would occur only with written agreement, and could include monetary compensation to the tidelands owner.

As with all other tribal shellfisheries, a tribal regulation will be issued to the tidelands owner and other

affected natural resource agencies. The regulation will indicate the type and quantity of shellfish that may be taken, the limits that apply to individual harvesters, if any, the type of harvest (commercial, ceremonial or subsistence) and the precise dates and times when harvest can occur. The regulation will limit the number of harvesters in accordance with the quantity of shellfish available for tribal harvest. Tribal harvests will take place during daylight low tides, unless the only available low tides are at night.

Monitors will be on-site to observe the fishery and record the catch as it is removed from the beach. This is another sound management tool the tribes use in all of their shellfisheries.

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Deepwater Harvest Training

Harvesting deepwater shellfish species for commercial markets requires special gear and training. As part of their management responsibility, the tribes are ensuring that tribal members participating in these fisheries are adequately trained.

Fisheries for geoduck, sea urchin and sea cucumber, for example, require tribal members to be trained in surface air supply diving. Few, if any, tribal members had the necessary

training for this type of harvesting prior to the Rafeedie Decision, so most have had to attend dive training classes taught by certified instructors.

To further tribal divers' preparedness, many tribes organized dive safety meetings with representatives of the federal Occupational Health and Safety Administration. These face-to-face meetings gave tribal divers important information about OSHA dive requirements.

Conclusion

The tribes, state, commercial shellfish growers and private interests all have a stake in preserving and enhancing western Washington's valuable shellfish resource. A strong co-management framework with the state, developed in part with the tribes' knowledge that has been handed down for many generations, will help guarantee that Indian and non-Indian alike will be able to enjoy this unique aspect of our region for decades to come.

For More Information

For more information about the natural resource management activities of the treaty Indian tribes in western Washington, contact the Northwest Indian Fisheries Commission, 6730 Martin Way E., Olympia, WA 98515; or call (360) 438-1180. The NWIFC home page is available on the World Wide Web at <http://mako.nwifc.wa.gov>.